



*Buying, Selling, Redeveloping Commercial Real Estate –  
How Environmental Insurance Can Help*



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# Buying, Selling, Redeveloping Commercial Real Estate – How Environmental Insurance Can Help

## SMART Remediation – Toronto – Jan 23, 2020

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### Overview

- 1) What are the risks
- 2) What is Environmental Insurance
- 3) Environmental Insurance Claims
  - Types of claims
  - How Remediation Technology Can Help
- 4) Questions and Answers

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## Common Environmental Exposures and Losses

### 1<sup>st</sup> Party Cleanup

- Cost overruns for pre-existing conditions
- Discovery of unknown pre-existing conditions
- Re-opener of "closed" issues

### Third Party

- Offsite cleanup
- Property Damage
  - Bodily Injury
  - Loss of value

### Regulatory and Legal

- Natural Resource Damage
- Toxic Tort Claims
  - Legal Defense Costs \*
- Off-site Disposal Legacy
- Fines and Penalties
- Governmental re-openers

### Business Risks

- Business interruption
- Loss of Rents
- Increased development costs

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## Triggering Events

- **Transactional Acquisition or Sale (M&A) with legacy liabilities**
- **Simple Real Estate Purchase and Sale and Refinancing**
- **Leases...existing and exiting**
- **Bankruptcy Issues/Corporate Restructuring**
- **Plant Closings**
- **Redevelopment Projects**
- **Construction**
- **Third Party Contractor Operations**
  - on site cause or exacerbate an environmental issue
  - result in a claim from adjacent properties or operations
- **Transportation of chemicals and materials**
- **Evolving and New Legislation/Regulation (eg Excess Soil)**

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## Managing Environmental Risks

- Develop Environmental Policies and Procedures – eg Environmental Management System
- Perform Environmental Due Diligence
  - Eg Phase I and II ESAs
- Transfer Environmental Risk/Liabilities
  - Releases and Indemnities in Agreements
  - **Use Environmental Insurance**  
Note: not generally for use in isolation or as a substitute for other risk management methods

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## Environmental Insurance Coverage Overview

- Fixed-Site Environmental Impairment Liability (commonly referred to as Pollution Legal Liability or PLL)
  - Single site or on a portfolio basis
- Contractors Pollution Liability (CPL)
  - Annual policy or on a project specific basis
- Professional Errors and Omissions
  - Available on a combined form with CPL from environmental insurers
- Lender Liability
- Underground Storage Tank coverage

Note: Different insurers use different names for similar coverage

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## Pollution Legal Liability

### Overview

- Insures against risk of costs and liability associated with **Pollution Conditions**
- Know conditions typically excluded\*
- Reduces financial uncertainty and impact from unforeseen events
- Common uses:
  - Real Estate Transactions incl. Financing
  - Brownfields Redevelopment
  - Portfolio management
  - M&A

### Coverages

- Clean-up Costs related to New Pollution Conditions
- Clean-up Costs related to unknown pre-existing conditions
- Third party claims of Bodily Injury and/or Property damage
- Business Interruption costs
- Non Owned Disposal Sites liability
- Fines and Penalties (where allowable by law)
- Natural Resource Damages
- Transportation to/from Covered Locations
- Legal Defense of all of the above

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## Trends in Environmental Insurance Claims

- Mostly first party discovery claims by Insured
- Redevelopment projects
  - Salt in soil/groundwater
  - Handling of contaminated and/or “impacted” excess soil/fill
- Indoor Air Quality (IAQ) for mould and vapour intrusion
- Emerging Contaminants (US experience):
  - PFAs (Per/Polyfluoroalkyl Substances)
  - 1,4 Dioxane
  - Pharmaceuticals/Personal Care Products
  - Coal Ash
- Regulators chasing any potentially responsible parties they can find
- Some third party claims – eg cleanup costs and/or diminution in value

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## How Claims are made on Environmental Liability Insurance Policies

- Pollution Condition is a) discovered by Insured and/or b) is discovered by a neighbour(s) and/or a regulator and a claim is made against the Insured
- Claim details provided to Broker and Insurer
  - Emergency Response costs incurred – eg. in the event of a spill
  - Details (incl. costs) of any investigation/delineation of the impact related to a loss event
  - Remediation plan including a discussion of options, potential costs, and rationale for option chosen
  - Insurers typically want the opportunity to review and comment before agreeing to cover remediation/cleanup costs

Note: Pollution Legal Liability type policies are written on a “claims-made” basis meaning a claim must be made during the policy period or any extended reporting period

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## Definition of Remediation Costs/Cleanup Costs

Example for Environmental Liability Insurance policy:

CLEANUP COSTS means the reasonable and necessary expenses incurred for the investigation, monitoring, testing, removal, disposal, neutralization, or treatment of a POLLUTION CONDITION to the extent required:

1. by any legislatively or administratively enacted law, rule, regulation or order applicable within the jurisdiction in which the COVERED LOCATION lies including any government action or demand pursuant thereto; or
2. to satisfy STANDARDS.

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## Environmental Insurance Claims and Remediation Technology

- The insurance claim process involves a certain amount of “back and forth” between an Insured, and their advisors, and the Insurer and their advisors
- The site owner/Insured may have more than just regulatory considerations to deal with when it comes to deciding what remediation/cleanup approach to pursue (eg future tenants, lenders, development partners)
- Claims managers and adjustors at the Environmental Insurance companies have varying degrees of understanding and experience with remediation technologies
- Many look to outside consultants and contractors when it comes to the management and/or oversight of claims involving remediation

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## Approaches to Cleanup/Remediation that can be supported by Environmental Insurance

- Onsite Remediation
- Insitu Remediation
- Localized “source” and/or “hot spot” remediation
- Excavation and Offsite Disposal/Treatment
- Risk Assessment incl. Risk Management Measures
- Barriers and/or Contaminant Capture
- Combination of any of the above.....

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## Claims Example

- Petroleum Hydrocarbons found on/in groundwater at former retail fuel outlet on covered location
- Initial remedial efforts involved pump & treat. This was followed by groundwater “vacuuming” followed by in-site injections
- Risk Assessment was also performed to determine if Ok to leave remaining contamination in place
- Combination of air sparging and vapour extraction applied to further reduce contaminant levels
- Remedial efforts still underway after more than 10 years.....

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## New Excess Soil Management Regulation and Environmental Insurance

- New Regulation may have unintended consequences when it comes to coverage for certain type of claims
- Key is in coverage description and in the definitions in the policy(ies):
  - Some insurance policies refer to waste and waste disposal - Is excess soil a “Waste”?
  - Definition Disposal Site or Non-owned Disposal Site
  - Transportation – make sure excess soils or something that would encompass excess soils (eg materials) is included in the coverage description and related definition(s)

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